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RECORD, CASE No. 14,592.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1125.

CHARLES McELVAINE, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AS AGENT AND WARDEN AT SING SING PRISON, IN THE STATE OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 27, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 27, 1891.

To the judges of the circuit court of the United States for the southern district of New York:

The petition of Charles McElvaine, by A. C. Astarita, his attorney, respectfully shows unto your honors that he is unlawfully imprisoned and restrained of his liberty, contrary to law and in violation of the Constitution of the United States and of the statutes of the United States, by Augustus A. Brush, agent and warden of the State prison at Sing Sing, in the southern district of New York.

The facts concerning the detention of your petitioner and the claim or authority under and by virtue of which he is so detained are as follows:

Your petitioner was convicted in the court of sessions, Kings county and State of New York, on or about the 25th day of September, 1890, of the crime of murder, and on the 1st day of October, 1890, was sentenced to death.

And, as your petitioner is informed and believes and as will appear by the record herein, your petitioner was again, on or about the 6th day of March, 1891, sentenced to death, which sentence is to be carried into effect, unless stayed, on or in the week commencing April 20th, 1891.

That the second sentence passed upon your petitioner was in violation of the Constitution and laws of the State of New
2 York and of the United States, the court having no right or authority, according to law, to sentence your petitioner the second time, as deponent believes.

Your petitioner further shows that under and by virtue of the first sentence herein he entered upon and expiated in part the punishment affixed by existing law to his offense.

Your petitioner further shows that under and by virtue of the sentence so passed upon your petitioner on or about the 6th day of March, 1891, he was remanded to the custody of Augustus A. Brush, the agent and warden of the State prison at Sing Sing, in the State of New York, to be executed accordingly, and that said Augustus A. Brush now holds petitioner and restrains him of his liberty for the purpose of killing your petitioner, in violation of the Constitution and laws of the United States and not otherwise.

Your petitioner further shows that the law under which said sentence was passed is unconstitutional and void and in antagonism to the laws and Constitution of the United States, particularly in the following respects and features:

That section 491 of the Code of Criminal Procedure of the State of New York, being a section, part, and provision of the law under which the petitioner has been sentenced to death, provides, among other things, as follows: "From the time of said delivery to the said agent and warden until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such im-
3 prisonment, he shall be kept in solitary confinement at said State prison and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel,

his physician, a priest or minister of religion, if he shall desire one, and the members of his family."

It is respectfully submitted by your petitioner that that portion of the sentence which prescribes as an element in and part of the punishment of the accused solitary confinement previous to his execution is in violation of the Constitution of the United States and the adjudication of the United States Supreme Court heretofore had in that regard, the same, however, being in the nature of dicta.

Attention is here called to article VIII of the Constitution of the United States, which provides that "excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Your petitioner further shows that said law under which the petitioner has been sentenced to death, to wit, the law contained in the Code of Criminal Procedure of the State of New York, from section 491 to section 509, inclusive, is unconstitutional and void, because under and by virtue of its provisions no authority is vested in any individual or public official to put the accused person to death.

Your petitioner shows that a former application for a writ of *habeas corpus* was made herein on or about the 10th day of April, 1891; that said writ was refused by Mr. Justice Lacombe,
4 who thereupon granted to petitioner a citation and the right to appeal herein; but petitioner avers that in the hurry of the preparation of that petition all the legal grounds and reasons why a writ of *habeas corpus* should be granted herein did not occur to the person who signed said petition.

Your petitioner also shows that the law under which the petitioner is to suffer death is unconstitutional and void because it does not prescribe how the accused shall be put to death, but it is left entirely to the discretion of the warden of the prison to determine in what manner the accused shall be put to death.

Furthermore, that it was the duty of the court who inflicted the sentence to explicitly direct the warden to inflict the death penalty at a certain time, instead of leaving it discretionary with that official to fix the day and hour of the execution.

Furthermore, that the warrant herein which commands the execution of your petitioner does not command that the accused be subjected to solitary confinement.

Your petitioner respectfully shows to the court that he is advised and believes that there are other grounds further than those heretofore stated on which the said law under which the petitioner has been sentenced to death is unconstitutional and void, and which grounds will be presented to the court on the argument herein.

But now so it is that neither by a motion for a new trial nor by motion in arrest of judgment, nor otherwise, under the limitations of the laws of the State of New York, can any court of said
5 State take cognizance of or afford petitioner any relief in the premises, and petitioner has no remedy or protection in respect thereto except under the Constitution and laws of the United States.

Therefore your petitioner alleges that said judgment and sentence and his restraint thereunder are without due process of law and are in violation of the laws and Constitution of the United States and void.

Your petitioner further shows that in the proceedings had in the trial of this case before the court of sessions, in the county of Kings and State of New York, and in the hearing before the court of appeals of the State of New York, the Constitution of the United States was repeatedly violated both in and by the court of sessions, in the county of Kings and State of New York, and by the court of appeals in the State of New York, as this petitioner is advised by those learned in the law and as will appear by the record of the proceedings had both in the court of sessions, county of Kings and State of New York, and in the hearing and the result and determination thereof before the court of appeals in the State of New York.

Particular reference is called to the refusal of the court *of* permit the accused to enter, through his counsel, the plea of insanity, which privilege was his under the Constitution of the United States and was a legal right absolutely belonging to the petitioner; and, again, to the condemnation of the accused, in view of the
6 overwhelming evidence produced of his insanity, there being no testimony of his sanity submitted to the court which tried the cause.

The court will perceive that these two propositions are fully borne out by an inspection of the record of the proceedings had in the court of sessions in the county of Kings, in the State of New York, and of the hearings before the court of appeals in the State of New York.

And the contention of the petitioner is broadly this: That the Supreme Court of the United States has the right to review and reverse any judgment based upon the operation of an unconstitutional law or founded upon the unconstitutional application of a constitutional measure.

Your petitioner therefore prays that this honorable court do forthwith issue the writ of *habeas corpus* to the said Augustus A. Brush, agent and warden of the prison at Sing Sing, in the State of New York as aforesaid, requiring him to produce the body of said petitioner before this court at some time designated in said writ, there to abide what shall be awarded by said court in the premises, and at the same time he prays your honors to issue out of said court the writ of certiorari to the said court of sessions in said county of Kings and State of New York, and to the clerk thereof, commanding it or him forthwith to certify to the said circuit court of the United States true copies of the indictment, judgment-roll, orders, commitments and warrants and objections, motions, certificates, and pro-
7 ceedings in said court remaining, and particularly such as were filed or had on or about the 6th day of March, 1891, under or by virtue of which said petitioner is now deprived of his liberty by the authority of that court.

Dated New York, April 21st, 1891.

A. C. ASTARITA,
Attorney for Petitioner.

STATE OF NEW YORK, }
City and County of New York, } ss:

A. C. Astarita, being duly sworn, deposes and says that he is informed and believes that the petitioner herein is a lunatic and an insane person, and, as deponent is further informed and verily believes, is unable to instruct counsel, and that is the reason why deponent makes the verification of the petition herein; that deponent derives the authority to appear for the petitioner from the sister and brother-in-law of said petitioner, through the attorney employed by them; that deponent has read the foregoing petition, and that the same is true on his best information, belief, and legal judgment, and that the view of the law therein expressed on his part is sincere, and that this proceeding is not taken for the purpose of delay, but, as deponent believes, in the interest of the law, which is unsettled, and of justice and humanity, which threaten to be outraged by the judicial execution of a person whom this deponent believes to be insane and irresponsible under the law.

A. C. ASTARITA.

Sworn to before me this 21st day of April, 1891.

GILBERT E. ROGERS,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

8 At a stated term of the circuit court of the United States for the southern district of New York held in the United States court building, in the city of New York, on the 21st day of April, 1891.

Present: E. Henry Lacombe, circuit judge.

Ex Parte CHARLES MCELVAINE.

A petition on behalf of Charles McElvaine having been duly presented to this court for a writ of *habeas corpus* to inquire into the cause of his detention at Sing Sing prison, in the southern district of New York, by Augustus A. Brush, agent and warden of said prison, and for relief in the premises—

Now, on reading and filing said petition, and after hearing A. C. Astarita, Esq., of counsel for said petitioner, it is ordered that the prayer of said petition be, and the same hereby is, in all things denied.

E. HENRY LACOMBE.

Endorsed: United States circuit court, southern district of N. Y. *Ex parte* Charles McElvaine. Order denying petition for writ of *habeas corpus*. A. C. Astarita, attorney for petitioner, 51 Chambers St., N. Y. city. U. S. circuit court. Filed Apr. 21, 1691. John A. Shields, clerk.

9 United States Circuit Court, Southern District of New York.

Ex Parte CHARLES MCELVAINE.

The petitioner, Charles McElvaine, conceiving himself aggrieved by the final decision of this court declining to grant the writ of *habeas corpus* herein, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record herein may be sent to the said Supreme Court.

Dated New York, April 21st, 1891.

A. C. ASTARITA,
Attorney for Petitioner.

The foregoing appeal is hereby allowed, and the clerk of this court is hereby directed to send to the Supreme Court of the United States a transcript of the petition, decision, order thereupon, and of this appeal.

Dated New York, April 21, 1891.

E. HENRY LACOMBE.

Endorsed: United States circuit court, southern district of N. Y. *Ex parte* Charles McElvaine. Appeal. A. C. Astarita, attorney for petitioner, 51 Chambers St., N. Y. city. Due and timely service of a copy of the within is hereby admitted. Dated Sing Sing, Apr. 21, 1891. A. A. Brush, agent & warden. U. S. circuit court. Filed Apr. 22, 1891. John A. Shields, clerk.

10 United States Circuit Court, Southern District of New York.

Ex Parte CHARLES MCELVAINE.

CITY AND COUNTY OF NEW YORK, *ss:*

James J. Martin, being duly sworn, doth depose and say that on the 22nd day of April, 1891, he mailed to the attorney general of the State of New York a certified copy of the citation, returnable April 27th, 1891, and a certified copy of the appeal herein by depositing the same, with postage prepaid, and securely enclosed in an envelope, in the letter box on the corner of Warren street and Broadway, in said city of New York, and the same was addressed as follows:

"Official Business."
"Hon. Chas. F. Tabor,
Attorney General,
State of New York,
Albany,
New York."

That the envelope and its contents before mentioned was so mailed about 1.15 p. m. on said 22nd day of April, 1891.

JAMES J. MARTIN.

Sworn to before me this 22nd day of April, 1891.

C. J. G. HALL,
Notary Public, N. Y. Co.

[SEAL.]

11 Endorsed: U. S. circuit court, southern district of New York. *Ex parte* McElvaine. Affidavit of service. U. S. circuit court. Filed Apr. 23, 1891. John A. Shields, clerk.

12 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Augustus A. Brush, agent and warden at Sing Sing prison, in the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at the city of Washington on the 27th day of April, 1891, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles McElvaine is appellant and said Augustus A. Brush, as agent and warden, is appellee, to show cause, if any there be, why the decision in the said appeal mentioned shall not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, this 21st day of April, A. D. 1891, and of the Independence of the United States the one hundred and fifteenth.

E. HENRY LACOMBE.

13 Endorsed: United States circuit court, southern district of N. Y. *Ex parte* Charles McElvaine. Citation. A. C. Astarita, attorney for petitioner, 51 Chambers St., N. Y. city. Due service of a copy of the within citation is hereby admitted. Dated Sing Sing, Apr. 21, 1891. A. A. Brush, agent & warden. U. S. circuit court. Filed Apr. 22, 1891. John A. Shields, clerk.

14 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 13, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Charles McElvaine, appellant, against Augustus A. Brush, appellee, as agent and warden, as the same remain of record and on file in said office, except certain records and proceedings had in said court in said case heretofore, a true and complete transcript of which records and proceedings were duly certified and returned by me to the Supreme Court of the United States on the 18th day of April, 1891.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 25th day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk*.

Endorsed on cover: Case No. 14,592. S. New York C. C. U. S. No. 1125. Charles McElvaine, appellant, *vs.* Augustus A. Brush, as agent and warden at Sing Sing prison, in the State of New York. Filed April 27, 1891.

SUPREME COURT OF THE UNITED STATES.

1 In the Matter of the Appeal of CHARLES McELVAINE.

It is hereby consented and agreed that the appellant herein have leave to print a duly certified copy of the commitment or warrant for the execution of Charles McElvaine upon the judgment pronounced against him, with the papers on appeal herein.

Albany, Oct. 26, 1891.

CHARLES F. TABOR,
Att'y Gen.

GEO. M. CURTIS,
Counsel for Appellant.

2 [Endorsed:] U. S. Supreme Court. In the matter of the appeal of Charles McElvaine. Consent.

3 The People of the State of New York to the agent and warden of the State prison at Sing Sing, Greeting:

Whereas at a court of sessions held in and for the county of Kings, at the court-house, in the city of Brooklyn, county of Kings, on the 26th day of September, one thousand eight hundred and ninety, by and before the Honorable Henry A. Moore, county judge of the county of Kings, presiding, and John McMahon and Charles A. Conrady, justices of the sessions of said county, Charles McElvaine was convicted of the crime of murder in the first degree, in that he, the said Charles McElvaine, late of the city of Brooklyn, county of Kings aforesaid, on the twenty-second day of August, in the year of our Lord one thousand eight hundred and eighty-nine, at the city and county aforesaid, with force and arms, in and upon one Christian W. Luca, wilfully, deliberately, premeditately, feloniously, and from a deliberate and premeditated design to effect the death of the said Christian W. Luca, did make an assault, and that the said Charles McElvaine, with a certain knife, him, the said Christian W. Luca, in and upon the chest, breast, side, back, shoulders, arms, body, and vital parts of him, the said Christian W. Luca, then and there wilfully, deliberately, premeditately, feloniously, and from a deliberate and premeditated design to effect the death of the
4 said Christian W. Luca, did strike, cut, and stab, giving unto the said Christian W. Luca, then and there, with the knife aforesaid, in and upon the chest, breast, sides, back, shoulders, arms, body, and vital parts of him, the said Christian W. Luca, divers mortal wounds, of which said mortal wounds he, the said Christian W. Luca, at the city and county aforesaid, on the said twenty-second day of August, 1889, in the year aforesaid, did die; and that the said Charles McElvaine, on the twenty-second day of August, in the year

of our Lord one thousand eight hundred and eighty-nine, at the city and county aforesaid, with force and arms, at about the hour of three o'clock in the night-time of the said day, at the city and county aforesaid, the dwelling-house of Christian W. Luca there situate feloniously and burglariously did break into and enter whilst there was then and there some human being, to wit, said Christian W. Luca, within the said dwelling-house, he, the said Charles McElvaine, then and there intending to commit some crime therein, to wit, the goods, chattels, and personal property of Christian W. Luca in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away, and while and during the time he, the said Charles McElvaine, was so engaged in the commission of such burglary and felony as aforesaid he, the said Charles McElvaine, did then and there, in the said dwelling-house aforesaid, on the day and year aforesaid, at the city and county aforesaid, wilfully and feloniously in and upon the said Christian W. Luca make an assault, and did then and there, while engaged in the commission of the felony and burglary as hereinbefore set forth, wilfully, knowingly, and feloniously with a certain knife cut, strike, and stab him, the said Christian W. Luca, in and upon the chest, breast, sides, back,
5 shoulders, body, and vital parts of him, the said Christian W. Luca, thereby giving and inflicting unto and upon him, the said Christian W. Luca, with and by the said knife divers mortal wounds in and upon the chest, breast, back, sides, arms, body, and vital parts of him, the said Christian W. Luca, of which said mortal wounds he, the said Christian W. Luca, at the city and county as aforesaid, on the day and year aforesaid, did die; and that the said Charles McElvaine, with force and arms, at about three o'clock in the night-time of the same day, at the city and county aforesaid, the dwelling-house of Christian W. Luca there situate feloniously and burglariously did break into and enter whilst there was then and there some human being, to wit, Christian W. Luca, within said dwelling-house, he, the said Charles McElvaine, then and there intending to commit some crime therein, to wit, the goods, chattels, and personal property of Christian W. Luca in the said dwelling-house then and there being then and there feloniously and burglariously to steal, take, and carry away, and while and during the time he, the said Charles McElvaine, was so engaged in the commission of such burglary and felony as aforesaid he, the said Charles McElvaine, did then and there, in the said dwelling-house, on the day and year as aforesaid, at the city and county as aforesaid, wilfully and feloniously in and upon said Christian W. Luca make an assault, and did then and there, while engaged in the commission of the felony and burglary as hereinbefore set forth, wilfully and feloniously with a certain knife strike, cut, and stab him, the said Christian W. Luca, in and upon the chest, breast, sides, arms, back, body, and vital parts of him, the said Christian W. Luca, thereby giving and inflicting upon him, the said Christian
6 W. Luca, with the knife aforesaid divers mortal wounds in and upon the chest, breast, sides, arms, back, body, and vital

parts of him, the said Christian W. Luca, of which mortal wounds he, the said Christian W. Luca, did then and there, to wit, on the day and year aforesaid, at the city and county aforesaid, *did* die; and that the said Charles McElvaine, in manner and form and by the means aforesaid, on the day and year aforesaid, at the city and county aforesaid, while engaged in the commission of felony and burglary as hereinbefore set forth, him, the said Christian W. Luca, wilfully, knowingly, and feloniously did kill and murder; and whereas, thereafter, and at a court of sessions held in and for the county of Kings, at the court-house, in the city of Brooklyn, county of Kings, on the first day of October, in the year one thousand eight hundred and ninety, by and before the judge and justices as before stated, the said Charles McElvaine was sentenced by the said court of sessions to the punishment of death, and that he, the said Charles McElvaine, within ten days from the date of said sentence, be by the sheriff of the county of Kings delivered to the agent and warden of said State prison at Sing Sing, and that said agent and warden of said State prison, within the week beginning on Monday, the seventeenth day of November, 1890, and ending with Sunday, the twenty-third day of November, 1890, do execute him, the said Charles McElvaine, by putting him, the said Charles McElvaine, to death in the mode, manner, and way and at the place by law prescribed and provided; and whereas the said Charles McElvaine did, by a notice of appeal duly filed in the clerk's office of the court of sessions
7 on the sixth day of November, 1890, appeal from said judgment of conviction and sentence to the court of appeals of the State of New York, and the record of the said judgment having been duly certified to the said court of appeals as by law required, and the said court of appeals having duly heard and considered the same, and having rendered a decision and judgment whereby it in all things affirmed the said judgment of conviction and sentence, and which said judgment of affirmance was entered by said court of appeals on the 24th day of February, 1891, and the remittitur of said court of appeals being now duly filed in the clerk's office of the court of sessions, and it appearing thereby that the said court of appeals has by it- said judgment ordered that the said judgment be remitted to the court of sessions to enforce its judgment as rendered against said Charles McElvaine according to law; and whereas, at a court of sessions held in and for the county of Kings, at the court-house, in the city of Brooklyn, county of Kings, on the sixth day of March, one thousand eight hundred and ninety-one, by and before Henry A. Moore, county judge of Kings county, presiding, and John McMahon and Charles A. Conrady, justices of the sessions of said county, it was by said court of sessions ordered and adjudged that the judgment of conviction and sentence thereon, as rendered and pronounced by the said court of sessions on the first day of October, 1890, against the said Charles McElvaine, be enforced and executed in manner provided by law, and did by said order designate and appoint the week beginning with Monday, the twentieth day of April, one thousand eight hundred and ninety-

one, as the time within which the said judgment of death as
8 pronounced by said court of sessions against the said Charles McElvaine should be executed and enforced:

Now, therefore, we do by this warrant, pursuant to the statute in such case made and provided, require, direct, and command that you, the agent and warden of the State prison at Sing Sing, cause the said judgment and sentence to be executed and enforced, and that within the week beginning on Monday, the twentieth day of April, one thousand eight hundred and ninety-one, you do execution of said judgment and sentence by putting him, the said Charles McElvaine, to death in the mode, manner, and way and at the place by law prescribed and provided.

Given under the hands and seals of Henry A. Moore, county judge of the county of Kings, presiding judge of said court of sessions, and John McMahon and Charles A. Conrady, justices of the sessions of said county of Kings, who constituted said court of sessions on the said sixth day of March, one thousand eight hundred and ninety-one.

(Signed) HENRY A. MOORE, [SEAL.]
County Judge of Kings County and Presiding Judge of the said Court of Sessions.

(Signed) JOHN McMAHON, [SEAL.]
(Signed) CHAS. A. CONRADY, [SEAL.]
Justices of the Sessions of the County of Kings and Justices of said Court of Sessions.

9 SING SING, *Oct.* 26, 1891.

George M. Curtis, Esq., counsellor-at-law, 261 Broadway, N. Y.

MY DEAR SIR: I do hereby certify that the foregoing is a correct transcript of the commitment of Charles McElvaine.

W. L. BROWN,
Agent and Warden.

10 [Endorsed:] "Copy." Warrant for the execution of Charles McElvaine in week beginning Monday, April 20, 1891.

11 Endorsed on cover: Supreme Court U. S. 1891, October term. No. 1125. Chas. McElvaine, app'l't, *v.* Brush, agent, &c. Stipulation & addition to record. Filed Oct'r 29, 1891.

Office Supreme Court U. S.
FILED.
NOV 28 1891
JAMES H. McKENNEY

Supreme Court of the United States,

OCTOBER TERM, 1891.

CHARLES McELVAINE,

Appellant,

vs.

AUGUSTUS A. BRUSH,

As Agent and Warden at Sing Sing Prison, in the State of New York.

APPELLANT'S BRIEF.

GEO. M CURTIS,

Counsel for Appellant.

STATEMENT.

The appellant and petitioner, Charles McElvaine, was convicted in the Court of Sessions, Kings County, in the State of New York, on or about the 23d day of October, 1889, of the crime of murder, and on the 25th day of October, 1889, said McElvaine was sentenced to death.

That said judgment of conviction and sentence of death was subsequently reversed by the Court of Appeals of the State of New York and a new trial was granted to this apellant.

(See 121 N. Y., page 250.)

That said new trial resulted on the 25th day of September, 1890, in a conviction of murder in the first degree, that on the 1st day of October, 1890, said McElvaine was again sentenced to death by the said Court of Sessions of Kings County.

That an appeal was subsequently taken to the Court of Appeals and that said conviction was duly affirmed by said Court of Appeals.

(See 125 N. Y., page 596.)

That on the 6th day of March, 1891, the said McElvaine was again sentenced to death by the said Court of Sessions of Kings County in the State of New York, which sentence was to have been carried into effect on or in the week commencing April 20th, 1891.

The rest of the necessary history of the case is contained in the Record now on file in this Court.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

IN THE MATTER

OF

THE APPEAL OF CHARLES McELVAINE.

APPELLANT'S BRIEF.

POINTS.

I.

The manner in which it is proposed to slay the appellant, is disclosed in sections 491 and 492 of the New York Code of Criminal Procedure, and is as follows:

"§ 491. Death warrant. [*Am'd* 1888.] When a defendant is sentenced to the punishment of death, the judge or judges holding the court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and deliver to the sheriff of the county a warrant stating the conviction and sentence, and appointing the week within which sentence must be executed.

Said warrant must be directed to the agent and warden of the State prison of this State, designated by law as the place of confinement for convicts sentenced to imprisonment in a State prison in a judicial district wherein such conviction has

taken place, commanding such agent and warden to do execution of the sentence upon some day within the week thus appointed. Within ten days after the issuing of such warrant the said sheriff must deliver the defendant, together with the warrant, to the agent and warden of the State prison therein named.

From the time of said delivery to the said agent and warden, until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the defendant shall be kept in solitary confinement at said State prison, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family."

"§ 492. Time of execution. [*Am'd* 1888.] The week so appointed must begin not less than four weeks and not more than eight weeks after the sentence. The time of the execution within said week shall be left to the discretion of the agent and warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided."

II.

The Supreme Court of the United States, *ex-parte*, in the matter of James J. Medley, Petitioner, and which was decided March 3rd, 1890. the late Mr. Justice Miller delivering the opinion of the Court, among other things say:

"It is unnecessary to examine all the points in which, according to the argument for plaintiff, the new statute was *ex post facto*; therefore we shall notice only a few of those which appear to us most deserving of attention, and in doing this we shall compare the new statute with the one which it superseded and repealed.

The first of these, and perhaps the most important, is that which declares that the warden shall keep such convict in solitary confinement until the infliction of the death penalty. The former law, the act of 1883, contained no such provision. It declared that every person convicted of murder in the first degree should suffer death, and every person convicted of murder in the second degree should suffer imprisonment in the penitentiary for a term of not less than ten years, which might extend to life ; and it declared that the manner of inflicting the punishment of death should be by hanging the person convicted by the neck until dead, at such time as the court should direct, not less than fifteen nor more than twenty-five days from the time sentence was pronounced, unless for good cause the court or governor might prolong the time. The prisoner was to be kept in the county jail under the control of the sheriff of the county, who was the officer charged with the execution of the sentence of the court. Solitary confinement was neither authorized by the former statute ,nor was its practice in use in regard to prisoners awaiting the punishment of death.

This matter of solitary confinement is not, as seems to be supposed by counsel, and as is suggested in an able opinion on this statute, furnished us by the brief of the counsel for the State, by Judge Hoyt (in the case of Henry Tyson,), a mere unimportant regulation as to the safe keeping of the prisoner, and is not relieved of its objectionable features by the qualifying language, that no person shall be allowed access to said convict except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Solitary confinement as a punishment for crime has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment.

In a very exhaustive article on this subject in the American Encyclopedia, Volume XIII, under the word "Prison," this history is given.

In that article it is said that the first plan adopted when public attention was called to the evils of congregating persons in

masses without employment, was the solitary prison connected with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut street Penitentiary, in Philadelphia, in 1787. The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size so arranged that he had no direct intercourse with, or sight of any human being, and no employment or instruction.

Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other States. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still committed suicide: while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system, and the *separate* system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787.

The article then gives a great variety of instances in which the system is somewhat modified, and it is within the memory of many persons interested in prison discipline that some thirty or forty years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe.

It is to this mode of imprisonment that the phrase solitary confinement has been applied in nearly all instances where it is used, and it means this exclusion from human associations; where it is intended to mitigate it by any statutory enactment or by any regulations of persons having authority to do so, it is by express exceptions and modifications of the original principle of "solitary confinement." The statute of Colorado is undoubtedly framed on this idea. Instead of confinement in the

ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff see him and visit him; where the sheriff and his attendants must see him; where his religious adviser and legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace and which, as this Court has judicially decided in *ex parte Wilson*, 114 U. S., 417; *Mackin vs. United States*, 117 U. S., 348; *Parkinson vs. United States*, 121 U. S., 281; and *United States vs. De Walt*, 128 U. S., 393, is itself an infamous punishment, and is there to be kept in "solitary confinement," the primary meaning of which phrase we have already explained.

The qualifying phrase in this statute is but a small mitigation of this solitary confinement, for it expressly declares that no one shall be allowed access to the convict except certain persons, and these are not admissible unless their access to the prisoner is in accordance with prison regulations prescribed by the Board of Commissioners of the penitentiary, under Section 2553 of the Laws of Colorado, in force since 1877. This section declares that "the Board of Commissioners of the penitentiary shall make such rules and regulations for the government, discipline, and police of the penitentiary, and *for the punishment of the prisoners confined*, not inconsistent with law, as they deem expedient." What these may be at any particular time is unknown. How far they may permit access of counsel, physicians, the spiritual advisers, and the members of his family, is a matter in their discretion which they exercise by general rules, which may be altered at any time so as to exclude all those persons, and thus the prisoner be left to the worst form of solitary confinement.

Even the statutory amelioration is a very limited one.

By the words "his attendants" in the statute, is evidently meant the officers of the prison and subordinates who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists.

They may be forbidden by prison regulations, however, from holding any conversation with him. The attendance of the

counsel can only be casual, and a very few interviews, one or two, perhaps, are all that he would have before his death, and that of the physician not at all, unless he was so sick as to require it, and the spiritual adviser of his own selection, and the members of his family, are all dependant for their opportunities of seeing the prisoner upon the regulations of the prison. The solitary confinement, then, which is meant by the statute, remains of the essential character of that mode of prison life as it originally was prescribed and carried out, to mark them as examples of the just punishment of the worst crimes of the human race.

The brief of counsel for the prisoner furnishes us with the statutory history of solitary confinement in the English law. The act 25, George II., chapter 37, entitled, "An act for the better preventing the horrid crime of murder," is preceded by the following preamble:—"Whereas, the horrid crime of murder has of late been more frequently perpetrated than formerly; and whereas it is thereby become necessary that some further terror and peculiar mark of infamy be added to the punishment of death now by law upon such as shall be guilty of the said offence"—then follow certain enactments, the sixth section of which reads as follows:

"Be it further enacted, That from and after such conviction and judgment given thereupon, the jailor or keeper to whom such criminal shall be delivered for safe custody shall confine such prisoner to some cell separate and apart from the other prisoners, and that no person or persons whatsoever, except the jailor or keeper, or his servants, shall have access to any such prisoner, without license being first obtained."

This statute is very pertinent to the case before us, as showing first, what was understood by solitary confinement at that day, and, second, that it was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as "a further terror and peculiar mark of infamy" to be added to the punishment of death. In Great Britain, as in other countries, public sentiment revolted against this severity, and by the statute of 6 and 7 William IV., chapter 30,

the additional punishment of solitary confinement was repealed.

The term *ex post facto* law, as found in the provision of the Constitution of the United States, to wit, that "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," has been held to apply to criminal laws alone, and has been often the subject of construction in this court.

Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offence for which the party is being tried is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, *Calder vs. Bull*, 3 Dall., 386, 390; *Kring vs. Missouri*, 107 U. S., 221; *Fletcher vs. Peck*, 6 Cranch, 87; or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, or by some law passed afterwards by which the punishment is not increased.

It seems to us that the considerations which we have here suggested show that the solitary confinement to which the prisoner was subjected by the statute of Colorado of 1889, and by the judgment of the court in pursuance of that statute, was an additional punishment of the most important and painful character, and is therefore, forbidden by this provision of the Constitution of the United States.

Another provision of the statute, which is supposed to be liable to this objection, of its *ex post facto* character, is found in section 3, in which the particular day and hour of the execution of the sentence within the weeks specified by the warrant shall be fixed by the warden, and he shall invite to be present certain persons named, to wit, a chaplain, a physician, a surgeon, the spiritual adviser of the convict, and six reputable citizens of the State of full age, and that the time fixed by said warden for such execution shall be by him kept secret, and in no manner divulged except privately to said persons invited by him to be present as aforesaid, and such

persons shall not divulge such invitation to any person or persons whomsoever, nor in any manner disclose the time of such execution. And section six provides that any person who shall violate or omit to comply with the requirements of section three of the act shall be punished by fine or imprisonment. We understand the meaning of this section to be that within the one week mentioned in the judgment of the Court the warden is charged with the power of fixing the precise day and hour when the prisoner shall be executed; that he is forbidden to communicate that time to the prisoner; that all persons whom he is directed to invite to be present at the execution are forbidden to communicate that time to him; and that, in fact, the prisoner is to be kept in utter ignorance of the day and hour when his mortal life shall be terminated by hanging, until the moment arrives when this act is to be done.

Objections are made to this provision as being a departure from the law as it stood before, and as being an additional punishment to the prisoner, and therefore, *ex post facto*.

It is obvious that it confers upon the warden of the penitentiary a power which had heretofore been solely confided to the Court; and is therefore a departure from the law as it stood when the crime was committed.

Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a Court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offence was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment."

III.

It is very interesting to observe in the history of criminal punishment the evolution of humanity. It must be remembered with shame in this more humane age, that little more than one hundred years ago, women were publicly whipped at the whipping-post by the stocks, or at any cart's tail. The fierce statute against vagrants, of Henry VIII's and Elizabeth's reign, made no distinction of sex, and their ferocious provisions to the effect that offenders "should be stripped naked from the middle upwards, and whipped 'till the body should be bloody," long continued in force. Men with their wives and children were flogged publicly, and sometimes by the order of the clergyman of the parish. Girls of twelve and thirteen, aged women of sixty, all suffered alike; women "distracted," in other words out of their minds, were arrested and lashed; so were those that had the small-pox, and all who walked around the country and begged. The constable's charge for whipping was four pence, but the same was increased later to a shilling.

The whipping-post was often erected in combination with the stocks. A couple of iron clasps were fixed to the upright which supported the stocks, to take the culprit's hands and hold him securely while he was being lashed.

A modification of this plan has long been used at Newgate, for the infliction of corporal punishment, and it may still be seen in the old ward at the back of the middle yard.

Ferocious as were most of the methods detailed of dealing with offenders against the law, they generally, except by accident, fell short of death.

Yet there were innumerable cases in those uncompromising and unenlightened ages in which death alone would be deemed equal to the offences. Rulers might be excused perhaps if they were satisfied with nothing less than a criminal's blood.

As Maine says: "The punishment of death is a necessity of society in certain stages of the civilizing process. There is a time when an attempt to dispense with it baulks two of the great instincts which lie at the root of all penal law. Without it the community neither feels that it is sufficiently revenged

on the criminal, nor thinks that the example of his punishment is adequate to deter others from imitating him." Hence all penal legislation in the past included some form of inflicting the death sentence.

These have differed in all ages and in all climes; about some there was a brutal simplicity; others have been marked by great inventiveness, great ingenuity, much refinement of cruelty. Offenders have been stoned, beaten, starved to death, they have been flayed alive, buried alive, cast headlong from heights, torn to pieces by wild animals, broken on the wheel, crucified, impaled, burnt, boiled, beheaded, strangled, drowned.

They have been killed outright, or by inches, enduring horrible agonies; after death their bodies have been dismembered and disembowled, as a mark of degradation.

Irresponsible tyrants went further than law givers in devising pains. The Sultan Mechmed, cut men in the middle, through the diaphragm, thus causing them to die two deaths at once. It is told of Croesus that he caused a person who had offended him to be scratched to death by a friller's carding-combs. What the Vaivod of Transylvania did to the Polish leader, George Jechel, may be read in the pages of Montaigne. The frightful barbarity to which he and his followers were subjected need not be repeated here.

The tender mercies of continental nations towards criminals may be realized by a reference to one or two of their contrivances for the infliction of death. The Iron Coffin of Lissa, for example, wherein the convicted person lay for days awaiting death from the fell pressure of the heavily-weighted lid, which slid down slowly, almost imperceptibly, upon his helpless frame; or the Virgin of Baden Baden, the brazen statue whose kiss meant death with frightful tortures, the unhappy culprit being commanded to prostrate himself and kiss the statue, but as he raised his lips a trap door opened at his feet, and he fell through on to a spiked wheel, which was set in motion by his fall.

There was the *chambre a crucer*, a short hollow chest lined with sharp stones, in which the victim was packed and buried alive; or the "bernicles," a mattress which clutched

the sufferer tight, while his legs were broken by heavy logs of wood; or the long lingering death in the iron cages of Louis XI, the occupant of which could neither sit, stand or lie down. Again the devilish tortures inflicted upon the murderers Ravaillac and Damiens caused a shudder throughout Europe. Ravaillac was burned piecemeal, flesh was torn from him by red-hot pincers, scalding oil and molten lead were poured upon his bleeding wounds, he was drawn and dismembered by horses while still alive, and only received his *coup de grâce* from the sticks and knives of the hellish bystanders, who rushed in to finish more savagely what the executioner had been unable to complete.

As for Damiens, the process followed was identical, but the details preserved of an event nearer our own time are more precise and revolting. He was fastened down upon a platform by iron gyves, one across his breast, the other just above his thighs; his right hand was then burnt with brimstone, he was pinched with red-hot pincers, after which boiling oil, molten wax, rosin, and lead were poured upon his wounds.

His limbs were next tightly tied with cords, a long and protracted operation, during which he must have suffered renewed and exquisite torture; four stout, young, and vigorous horses were attached to the cords, and an attempt made to tear his limbs asunder, but only with the result of "extending his joints to a prodigious length," and it was necessary to second the efforts of the horses by cutting the principal sinews of the sufferer. Soon after this the victim expired. Then his body was burnt and the ashes scattered to the winds.

In England the simpler forms of executions have generally obtained. The stake was no doubt in frequent use at certain periods for particular offences, but the axe and the rope were long the most common instruments of despatch.

Death was otherwise inflicted, however. Drowning is mentioned by Stowe as the fate of pirates, and a horrible method of carrying out capital punishment remained in force until 1772. Pressing to death, or the *peine forte et dure*, was a development of the ancient prison *forte et dure*, the punishment of those who refused "to stand to the law;" in other words,

stood mute and refused to plead to a charge. Until the reign of Henry IV, such persons were condemned to penance and perpetual imprisonment, but the penance meant confinement in a narrow cell and absolute starvation.

Some evaded the dread consequences, and therefore a more awful form of torture was introduced with the object of compelling the silent to speak.

An accused person who persistently stood mute was solemnly warned three times of the penalty that waited on his obstinacy, and given a few hours for consideration. If the prisoner continued contumacious, the following sentence was passed upon him or her:

"That you be taken back to the prison whence you came to a low dungeon, into which no light can enter; that you be laid on your back on the bare floor with a cloth round your loins, but elsewhere naked; that there be set upon your body a weight of iron as great as you can bear and greater; that you have no sustenance, save on the first day three morsels of the coarsest bread, on the second day three draughts of stagnant water from the pool nearest to the prison door, on the third day again three morsels of bread as before, and such bread and such water alternately from day to day till you die."

The press was a form of torture with this difference that, when once applied, there was seldom any escape from it.

The practice of tying the thumbs with whipcord was another form of torture inflicted to oblige an accused person to plead, and in force as late as the reign of Queen Anne.

Regarding the *peine forte et dure*, Holinshed says, that when accused felons stood mute of malice on arraignment, they were pressed to death "by heavy weights laid upon a board that lieth over their breasts and a sharp stone under their backs, and these commonly held their peace thereby to save their goods unto their wives and children, which if they were condemned should be confiscated to the prince."

There are continuous references to the *peine forte et dure* in the legal records throughout the fifteenth to the seventeenth centuries. In 1605, Walter Calverly, Esq., of Calverly

in Yorkshire, who was arraigned for the murder of his wife and two children, stood mute and was pressed to death in York Castle. Another noticeable instance of the application of this fearful punishment was in the case of Major Strangways, who was arraigned in February, 1657–8, for the murder of his brother-in-law, Mr. Fussell. He refused to plead unless he was assured that if condemned he might be shot as his brother-in-law had been. In addition he said that he wished to preserve his estate from confiscation. Chief Justice Glyn reasoned with him at length, but could not alter his decision, and he was duly sentenced to the *peine forte et dure*. The sentence ran that he was to be put into a mean room where no light could enter, and where he was to be laid upon his back with his body bare; his legs and arms were to be stretched out with cords, and then iron and stone were to be laid upon him, "as much as he could bear, and more;" his food the first day was to be three morsels of barley bread, and on the second day he was "to drink thrice of water in the channel next to the prison, but no spring or fountain water, and this shall be his punishment till he dies."

Strangways suffered in Newgate. He was attended to the last by five pious divines, and spent much of his time in prayer.

On the day of execution he appeared all in white—"waistcoat, stockings, drawers and cap, over which was cast a long mourning cloake," and so was "guarded down to a dungeon in the press-yard, the dismal place of execution." On his giving the appointed signal "his mournful attendants performed their dreadful task. They soon perceived that the weight they laid on was not sufficient to put him suddenly out of pain, so several of them added their own weight that they might sooner release his soul." He endured great agonies. His groans were "loud and doleful," and it was eight or ten minutes before he died. After death his body was exposed to view, and it was seen that an angle of the press had been purposely placed over his heart, so that he might the sooner be deprived of life, "though he was denied what is usual in these cases, to have a sharp piece of timber under his back to hasten execution.

The principal forms of capital punishment, however, as the derivation of the expression implies, have dealt with the head as the most vulnerable part of the body. Death has been and still is most generally inflicted by decapitation and strangulation.

The former, except in France, where it came to be universal, was the most aristocratic method; the latter was long applied only to criminals of the baser sort. Until the invention of the guillotine culprits were beheaded by sword or axe, and were often cruelly mangled by a bungling executioner. It is asserted by the historian that the executioner pursued the Countess of Salisbury about the scaffold, aiming repeated blows at her, before he succeeded in striking off her head.

This uncertainty in result was only ended by the ingenious invention of Dr. Guillotin, the rude germ of which existed long previously in the Scotch "maiden."

The regent, Morton, who introduced the instrument into Scotland and who himself suffered by it, is said to have taken it from the Halifax Gibbet. Guillotin's machine was not altogether original, but it owed more to the Italian "Mannaïa" than to the "maiden." Nor, according to Sanson, the French headsman, was he the actual inventor of the notorious instrument, guillotine, which bears his name. The guillotine was designed by one Schmidt, a German engineer and artificer of musical instruments.

Guillotin enthusiastically adopted Schmidt's design, which he strongly recommended in the Assembly, declaring that by it a culprit could not suffer, but only feel a slight freshness on the neck. Louis XVI was decapitated by the guillotine, as was the doctor, its sponsor and introducer.

Strangulation, whether applied by the bowstring, cord, handkerchief or drop, is as old as the hills. It was inflicted by the Greeks as an especially ignominious punishment. The "susper coll," was not unknown in the penal law of the Romans, who were in the habit also of exposing the dead convict upon the gibbet, "as a comfortable sight to his friends and relatives." (Extract from the Halifax Gibbet.) By "Halifax law," any thief who within the precincts of the liberty

stole thirteen pence could, on conviction before four burghers' be sentenced to death. The same law obtained at Hull, hence the particular prayer in the thieves' litany, which ran as follows: "From Hull, Hell and Halifax, good Lord, deliver us."

As late as the year 1783, in England the Penal Code was still ruthlessly severe.

There were some two hundred capital felonies upon the statute books. Almost any member of Parliament eager to do his share in legislation could "create a capital felony." A story is told of Edmund Burke, that he was leaving his house one day in a hurry, when a messenger called him back on a matter which would not detain him a minute: "Only a felony without benefit of clergy." Burke also told Sir James Mackintosh, that although scarcely entitled to ask a favor of the ministry, he thought he had influence enough to create a capital felony. It is true that of the two hundred, not more than five-and-twenty sorts of felonies actually entailed execution. It is true too, that some of the most outrageous and ridiculous reasons for its infliction had disappeared. It was no longer death to take a falcon's egg from the nest, nor was it a hanging matter to be thrice guilty of exporting live sheep. But a man's life was still appraised at five shillings.

Stealing from the person or in a dwelling, or in a shop, or on a navigable river, to that amount, was punished with death. "I think it not right nor justice," wrote Sir Thomas Moore, in 1516, "that the loss of money should cause the loss of man's life; for mine opinion is that all the goods in the world are not able to countervail man's life."

Three hundred years was still to pass before the strenuous efforts of Sir Samuel Romilly bore fruit in the amelioration of the Penal Code. In 1810 he carried a bill through the House of Commons, which was, however, rejected by the Lords, to abolish capital punishment for stealing to the amount of five shillings in a shop. His most bitter opponents were the great lawyers of the times, Lords Ellenborough, Eldon, and others, Lords Chancellors and Lords Chief Justice, who opposed dangerous innovations and viewed with dismay any attempt "to alter laws which a century had

proved to be necessary." Lord Eldon on this occasion said that he was firmly convinced of the wisdom of the principles and practice of the English criminal code. Romilly did not live to see the triumph of his philanthropic endeavors. He failed to procure the repeal of the cruel laws against which he raised his voice, but he stopped the hateful legislation which multiplied capital felonies year by year, and his illustrious example found many imitators.

Within a few years milder and more humane ideas very generally prevailed. In 1837, the number of offences to which the extreme penalty could be applied was only seven, and in that year only eight persons were executed, all of them for murders of an atrocious character.

Forgery, at this period was an offence especially repugnant to the law.

No one guilty of it could hope to escape the gallows. The punishment was so certain, that as milder principles gained ground, many benevolent persons gladly withdrew from prosecution where they could. Instances were known in which bankers and other opulent people compromised with the delinquent rather than be responsible for taking away a fellow-creature's life. The prosecutor would sometimes pretend his pockets had been picked of the forged instrument, or he destroyed it, or refused to produce it. An important witness sometimes kept out of the way. Persons have gone so far as to meet forged bills of exchange, and to a large amount. In one case is was pretty certain they would not have advanced the money had the punishment been short of death, because the culprit had already behaved disgracefully, and they had no desire he should escape a lesser retribution. Prosecutors have forfeited their recognizances sooner than appear, and have even, when duly sworn, withheld a portion of their testimony.

But at this time the law generally took its course. In the years between 1805 and 1818, there had been two hundred and seven executions for forgery; more than for either murder, burglary or robbery from the person. It may be remarked here that the Bank of England was by far the most bitter and

implacable as regards prosecutions for forgery. Of the above mentioned two hundred and seven executions for this crime, no less than seventy-two were the victims of proceedings instituted by the Bank. Forgeries upon this great monetary corporation had been much more frequent since the stoppage of specie payments, which had been decreed by the Parliament in 1797 to save the Bank from collapse.

Alarms of invasion had produced such a run upon it, that on one particular day little more than a million in cash or bullion remained in the cellars, which had already been drained of specie for foreign subsidies and subventions.

Following the cessation of cash payments to redeem its paper in circulation, the Bank had commenced the issue of notes to the value of less than five pounds, and it was soon found that these, especially the one pound notes, were repeatedly forged.

In the eight years preceding 1797 but few prosecutions had been instituted by the Bank; but in the eight immediately following there were one hundred and forty-six convictions for the offence. At last, about 1818, a strong and general feeling of dissatisfaction grew rife against these prosecutions.

The crime had continued steadily to increase, in spite of the awful penalties conviction entailed.

It was proved, moreover, that note forgery was easily accomplished. Detection too, was most difficult. The public were unable to distinguish between the good and bad notes. Bank officials were themselves often deceived, and cases were known where the clerks had refused payment of the genuine article. Juries began to decline to convict on the evidence of inspectors and clerks, unless substantiated by the revelation of the private mark, a highly inconvenient practice, which the Bank itself naturally discountenanced. Efforts were made to improve the quality of the note, so as to defy imitation; but this could not well be done at the price, and, as the only effective remedy, specie payments were resumed, and the one pound note withdrawn from circulation. But execution for forgery continued to be the law for many more years.

Fauntleroy suffered for it in 1824; Joseph Hunton, the Quaker linen draper, in 1828; and Maynard, the last, in the following year.

(See Sir James Mackintosh on the state of the criminal law. Also Wade, p. 1056. Also Evidence of Alderman Harmer, before Committee on Capital Punishment, 1819.)

IV.

Let us now see how this question of confinement in a State Prison with or without hard labor is viewed by the U. S. Supreme Court, the most important and exalted tribunal of which we have any knowledge. In the case of United States vs. DeWalt, reported in 128 U. S. Reports, page 393, October Term, 1888, Mr. Chief-Justice Fuller, in delivering the opinion of the Court, declares the true doctrine to be as follows: DeWalt, the appellee, was tried and convicted, upon an information of the crime of embezzlement and making false entries as the president of a national bank, in violation of §5209 of the Revised Statutes, and sentenced and committed to the penitentiary for ten years. This section prescribes the punishment of imprisonment for not less than five nor more than ten years, which imprisonment may be ordered to be executed in a State jail or penitentiary. Rev. Stat. §5541.

Appellee was subsequently discharged on *habeas corpus* upon the ground that the crime in question was an infamous crime, for which he could not, under the Constitution, be held to answer on information, but only on presentment or indictment by a grand jury. From the order discharging him this appeal is prosecuted, and it is contended that a crime is not infamous which is not subject to the penalty of hard labor as part of the punishment of imprisonment.

This, however, was otherwise ruled in *Mackin vs. United States*, 117 U. S., 348, 352, where this Court held, speaking

through Mr. Justice Gray, "that at the present day imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment."

That case is decisive of this, and the order appealed from must be *Affirmed*.

The same question is very ably and exhaustively discussed by Mr. Justice Gray, who delivered the opinion of this Court in Ex-parte Wilson, reported in 114 U. S. Reports, page 417.

The attention of the Court is also called to the case of Mackin and another vs. United States, reported in 117, U. S. Reports, page 348, in which the opinion of this Court is also delivered by Mr. Justice Gray, and in this case that most learned and accomplished jurist goes a step further than in Ex-parte Wilson and declares, "that a crime punishable by imprisonment in a State prison or penitentiary with or without hard labor is an infamous crime within the provision of the Fifth Amendment of the Constitution, that 'no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury.'"

The same doctrine is laid down by the late Mr. Chief-Justice Waite, in the case of Parkinson v. United States, reported in 121, U. S. Reports, page 281, October Term, 1886.

V.

The Court, it is respectfully submitted, will be unable to find any legal authority derived either from adjudication or federal enactment, that the allowance of an appeal by a judge of a Circuit Court, or by the judge of the District Court of the United States, operates as, or constitutes a stay of proceedings in the case of one condemned to die under State law. And if this proposition be correct, then the Warden of the State Prison at Sing Sing or Auburn violated the law on every occasion, when he suspended the execution of a criminal condemned to death by a judge of the State

Court, upon the mere service upon him, the said Warden, of a copy of the appeal and its allowance by a judge of the Federal Court.

I understand that a number of advocates have been held amenable to judicial censure, because the Warden of the prison and his advisers put a wrongful and unlawful construction upon the real power, scope and legal effect of the order of appeal.

It will be noticed that the case at bar was moved into this Court early in the month of April of the present year, and that it is no fault either of the appellant, his attorney or his counsel that the cause was not heard before the Summer vacation. The learned Attorney-General never made a motion to advance the cause until October 13th, 1891, and no objection was made either by the attorney for the appellant or his counsel to the cause being so advanced.

Both the attorney and the counsel for the appellant have been anxious from the beginning to have a speedy disposition of the cause. Both are acting simply from motives of humanity and not from any desire or expectation of pecuniary reward, as the appellant and his friends are utterly impoverished, and the great bulk of appellant's expenses has been borne by Mr. Curtis, the counsel for the appellant, who believes, to use the expressive and felicitous language of Governor Seward in the case of Freeman, that it is his duty "to follow this idiot boy up to the steps of the scaffold."

VI.

The attention of the learned Court is respectfully called to Article 8 of the Constitution of the United States, which provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The Constitution of the United States, be it said with all reverence and Christian piety, is an inspiration of the Deity, as were the Books of Moses and the Acts of the Apostles.

The highest intellect, the purest lives, and the most exalted and patriotic character of the Republic were invoked to frame it. It was especially distinguished for its religious tolerance, and its grand humanity.

The question which immediately recurs is, is solitary confinement cruel and unusual punishment?

We answer without hesitation, in the light of the authority of Ex-parte Medley, and of the history, nature, character, and experience of solitary confinement, that it is both cruel and unusual.

Judge Cooley in his work on Constitutional law observes at page 307, that "a punishment may be unlawful because it is a punishment long disused for its cruelty, until it has become unusual. Nothing more definite can, on this point be affirmed."

The punishment of solitary confinement in connection with capital punishment was unknown in this State until the enactment of the present law. Therefore it is doubly unusual. It was totally unknown in our Provincial history prior to the Revolution.

It has never been an element in our Penal Code or system in the State of New York since the achievement of Independence.

It certainly cannot be contended that it is essential or necessary for the security of the criminal; hence, it must be regarded as an additional element in the punishment.

That leads us to inquire is it a cruel punishment? And the entire history of solitary confinement sustains the proposition that it is "cruel" within the meaning of the Federal Constitution.

VII.

It is very clear that the Circuit Court of the United State, have under section 752 of the United States Revised Statutes

power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint to liberty. (See American and English Encyclopedia of Law, Vol. 9, page 168, and cases cited under note 2.)

It is also apparent that appeals in cases of *habeas corpus* lie from the Circuit to the Supreme Court of the United States, in the case of any person alleged to be restrained of his liberty in violation of the Constitution of the United States. (See American and English Encyclopedia of Law, Vol. 9, page 172, and the cases cited under note 2.) This language is used in one of the cases cited "the right of appeal in *habeas corpus* cases is absolute."

The application for a writ of *habeas corpus* should put before the Court or judge facts enough to permit an intelligent judgment to be formed of the case. This we respectfully submit has been done by the attorney of the appellant and petitioner in this case, and the pertinent Federal question is presented whether or not as a principle of law, solitary confinement is "cruel and unusual," and therefore within the pale of the Constitutional provision.

This petition undoubtedly was prepared under circumstances of haste and excitement and while it may not have the precision of a plea in abatement, it certainly presents a great Constitutional question of which this Court has especial cognizance.

VIII.

The Court below having disallowed the writ, of course there was no return to the same by the warden of the State Prison and no opportunity of traversing such Return, and the allegations in the petition on all material questions of fact are to be regarded as undisputed, for the purposes of the argument before this august tribunal.

IX.

The history of confinement in the prisons of the world, is interesting and instructive, and the character of solitary confinement is not difficult to establish from the history of the past.

The scriptures contain references to prison-houses and to the punishment of offenders.

In Greece and Rome, punishments were inflicted by loss of caste of citizenship and of liberty, banishment and penal labor which was sometimes performed on the public works, sometimes in quarries and mines.

In the Roman Empire there were houses called *ergastula* used chiefly for the punishment of criminal and refractory slaves.

In Rome there still remains a prison known as the Mamertine—caves consisting of several vaults or apartments.

The feudal barons had towers in their castles called *dongons*, whence is derived dungeon, for the confinement of their captive foes or refractory retainers.

There are three systems of confinement in use; 1, the separate or cellular, known also as the Pennsylvania, or "individual treatment"; 2, the associate or congregate, also called the Auburn; 3, the Irish convict or Crofton. The foundation of the separate system, as it is now practiced in this country and in Europe, was laid in Philadelphia in the latter part of the last century.

The abuses attending the treatment of prisoners had been strongly condemned by a number of philanthropists in that city. Prisoners were associated together day and night, and made to work in the public streets. In 1790 a law was passed by the legislature to try the system of "solitary confinement to hard labor," which was soon after adopted in the Walnut street jail.

In 1821 the legislature authorized the construction of the eastern penitentiary there, which was opened in 1829. The western penitentiary had been opened in Pittsburg in 1827, and in both the separate system was adopted.

It has been discontinued in the western, but in the eastern it is still maintained. This prison was visited by De Tocqueville, Beaumont, Demetz, Blonet, Mr. Crawford, inspector general of the prisons of England, and other foreign publicists, and was taken as the model of the great English prison of Pentonville, and of other prisons in Paris, Belgium, Holland, Germany, Sweden, Norway, Denmark and other countries. The distinguishing features of the separate or cellular system are individual separation of the prisoners day and night during the entire term of their imprisonment, communication with the officials, visits and correspondence with persons outside under prescribed restrictions, individual walks in the open air, obligatory and remunerated work for the prisoners, and mental, moral, religious and technical individual instruction. Not only is the association of convicts prevented, but even the opportunity of seeing one another. Each is kept in a separate cell, where he eats, sleeps, works and passes the entire term of his imprisonment, except the time spent in exercise in the small yard attached to his cell.

When he leaves his cell his face, except the eyes, is covered with a cap to prevent recognition.

When religious services are held, the convicts in many prisons remain in their cells. In the Belgian prisons they can see the priests, but not one another; in the eastern penitentiary they hear but do not see the preacher.

In the cellular prison at Bruchsal, Baden, they leave their cells to attend religious services and to receive secular instruction, but with their faces covered ; visitors are seen in a room assigned for that purpose.

Chief among the objections urged against the system is that it wars against the social instinct in men, producing a morbid state of mind and increasing the percentage of insanity.

In the United States the separate system has met with little favor outside of Pennsylvania; in every other State the congregate plan has been adopted.

(See volume 14 of the American Cyclopedia. Article on prisons.)

X.

In the case of Kemmler, in which the opinion was rendered by Mr. Chief-Justice Fuller, and which is reported in 136 U. S. Reports, page 438, the question of solitary confinement so far as we can glean, is neither discussed or decided. In that important cause the application of electricity, the lightning breath of the Deity to the condemned, for the purpose of producing death, was decided not to be "cruel and unusual" within the meaning of the constitution.

XI.

The Constitution of New York contains this declaration:

"Every citizen may freely write, speak and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press." A similar declaration is embodied in the Constitution of the United States, and in that of every State in the Union It is a fundamental principle of our institutions, an essential of republican government. It is a right which the people have reserved to themselves in their fundamental law.

No legislature has any power to infringe it. No Court can rightly impair it. Under the law as it exists, the press are excluded from the scene of execution, and are prohibited from publishing the details of it.

The provision of the Federal Constitution in this regard is as follows: Article I, amendment to the Constitution of the United States of America.

Article I declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 507 of the New York Code of Criminal Procedure provides among other things as follows: "No account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the prison, shall be published in any newspaper. Any person who shall violate or omit to comply with any provision of this section shall be guilty of a misdemeanor."

We shall not discuss the question thus arising, because, so far as the appellant is concerned, it is a collateral one, and can, not with propriety and pertinency be urged.

Still, an expression of the opinion of this august tribunal upon this important subject matter would solve all doubt as to the fate of the numberless appeals which will deluge this Court growing out of prosecutions of the editors and publishers of many prominent New York City papers, for the violation of this section referred to.

In this way this appeal would be the instrument of saving a very large sum of money to the State of New York and a very great trespass upon the time, attention, and patience of the Supreme Court of the United States.

XII.

It will be observed that in the case of Kemmler the form of the commitment or warrant of execution which seems to be the correct and legal one is as follows: "Now, therefore, you are hereby ordered, commanded and required to execute the said sentence upon him, the said William Kemmler, otherwise called John Hart, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within

the walls of Auburn State Prison, or within the yard or enclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hart, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hart, be dead."

(See *In re* Kemmler 136, U. S. Reports, page 441.)

In the commitment or warrant of execution in the case at bar the specific mode of death is not indicated, but the agent and warden of the State Prison at Sing Sing is left to his own construction of the law in the premises.

The language of the commitment in this regard is as follows: "Now, therefore, we do by this warrant, pursuant to the statute in such case made and provided, require, direct and command that you, the agent and warden of the State Prison at Sing Sing, cause the said judgment and sentence to be executed and enforced, and that within the week beginning on Monday, the twentieth day of April, one thousand eight hundred and ninety-one, you do execution of said judgment and sentence by putting him, the said Charles McElvaine, to death in the mode, manner and way and at the place by law prescribed and provided."

(See commitment or warrant of execution on last page of Paper Book on Appeal.)

The agent or warden is simply a ministerial officer and not a judicial one. No power is given him under the Constitution to construe his duties under the law.

In the case of Kemmler, in which the proceedings were based upon a petition to the Supreme Court of the State of New York, a return was duly made by the agent and warden and the whole record came up in review before the State Court, and the Federal tribunal, because in the first instance

the Court granted the writ of *habeas corpus*, and in this way an intelligent understanding of the whole case was had by the Court.

If Mr. Justice Lacombe below had granted the writ of *habeas corpus* the whole record of the case at bar would have been before him and at this present time before the appellate tribunal, even though he had discharged the writ and remanded the condemned after argument had.

As the record stands, for the purposes of this argument on appeal, all things in the petition save contentions and conclusions of law, are to be taken as controllingly and conclusively true.

XIII.

The warrant of execution, or commitment herein, does not command that the accused be subjected to solitary confinement. (See warrant of execution at the end of Paper Book on Appeal.)

The agent and warden in no sense has any right to go beyond the express letter of his command.

XIV.

The peculiarities of the solitary system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction.

The quiet and order which were substituted for the disorder of the previous want of system, commended it at first to

the public mind; and other prisons on the same plan, but less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other States, and in some instances, where it was not adopted for all the prisoners, cells on this plan were constructed for the worst criminals.

But experience soon demonstrated that there were very serious objections to it. A considerable number of the criminals fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them; others became violently insane; others still committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

The great cost of prisons constructed on this principle was another objection to it; and the prisoners being entirely unemployed, the whole charge of their maintenance came upon the State.

It became evident that some changes must be made in the system. The "separate" system was originated by the Philadelphia society for ameliorating the miseries of public prisons, founded in 1787. Retaining the plan of continuous cellular confinement, it permits the prisoner to work in his cell, in some instances even encouraging him by reward for over-work; furnishes him with books, both for reading and study, and permits him to receive the instruction in his cell, or as in Pentonville, England, in a general school room, where, however he is not permitted to see, though he may hear, his classmates; provides, under similar restriction, for his attendance upon a prison chapel, or at least allows the chaplain to preach in the corridor, so that all can hear at the same time; or in some instances gives him a little garden to cultivate, and thus supply himself with some luxuries; permits the visits of the officers, chaplains, &c., to his cell, and to some extent of other people; allows him to correspond under supervision with his friends; and, at Pentonville and some other prisons of the class, provides such comforts and appliances in his cell as make it in itself more comfortable even than the sleeping

rooms of persons of the middle classes generally. The advantages of this system are represented to be, that it individualizes the convict, and prevents his recognition by other prisoners who are confined with him, and who after his discharge might attempt to compel him to vicious courses by their knowledge of his previous disgrace; that it renders a large force of guards unnecessary, since combinations and conspiracies are impossible; that it also prevents his degradation by those severe personal indignities which are regarded as indispensable in congregated prisons; and that it gives him more opportunity for instruction and reformation, to which end the good influences to which he is subjected are supposed to contribute.

(See American Cyclopedia, volume 13, Article Prison, Edition of 1863.)

Under the law as it now stands, the severity of the punishment of the condemned is very conspicuous.

No person shall be allowed access to him without an order of the Court, except the officers of the prison, whose visits are controlled by the rules, and are only made as it is necessary to give the condemned food or water, or to see that in his despair he does not commit suicide.

His counsel and his physician are also permitted to see him, the one when legal advice or consultation becomes necessary, the other, when it becomes important to preserve the body of the condemned for the executioner.

Even the visits of these must be at the discretion and under the jealous supervision of the warden.

A priest or minister of religion under the same restrictions, is permitted to visit him if he shall desire him to do so, and the members of his family enjoy an equal privilege, but it is not specified how often these visits can be made, nor of how long duration they shall consist, and it is quite evident that this provision of the law, is a heartless mockery of the condemned, in his solitude and despair.

(See Section 491, N. Y. Code of Criminal Procedure, Edition of 1889.)

Mental torture by many minds and physical constitutions, is more to be dreaded than the horrors of physical agony.

Cranmer, when he put his hand into the blaze did not feel the burn, because he was in a state of spiritual and moral ecstacy.

The devoted martyrs of the suffering remnant of the Church of Scotland welcomed the boot, the thumbscrew and the gibbet with a spiritual passion and longing which made immortal these children of God.

Men, women and children in the name of the merciful Prince of Peace, suffered untold atrocities at the hands of the brutal Alva in the Spanish Netherlands, three centuries ago; but they went to death with shouts of Hosanna; because to them it was the opening of the doors of Paradise.

XV.

The manner and mode of the infliction of the death penalty must be specifically stated in the warrant of execution.

This principle is fundamental: we have never heard it or seen it contradicted or denied. There is no legal authority vested in the agent or warden under and by the warrant of execution to put the appellant to death in any form or manner.

(See warrant of execution on last page of the Record.)

Lastly.

It follows, that if the views expressed in this paper are correct and sufficient, that the order of Mr. Justice Lacombe, below, denying the writ of *habeas corpus*, should be reversed.

GEO. M. CURTIS,

Counsel for Appellant.

Office Supreme Court U. S.
FILED.
DEC 7 1891
JAMES H. McKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1891.

Term No. 1125.

CHARLES McELVAINE, APPELLANT,

against

AUGUSTUS A. BRUSH, AS AGENT AND WARDEN AT SING SING PRISON, IN THE STATE OF NEW YORK.

Appeal from Circuit Court of the United States for the Southern District of New York.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

CHARLES McELVAINE, APPELLANT,

against

AUGUSTUS A. BRUSH, AS AGENT AND WARDEN AT SING SING PRISON.

STATEMENT OF FACTS.

On the 23d day of October, 1889, the above-named appellant, Charles McElvaine, was convicted of murder in the first degree, of one Lucca, at a Court of Sessions, duly held in the county of Kings, State of New York, which murder was committed on the 22d day of August, 1889; an appeal was duly taken by said McElvaine from said judgment of conviction to the Court of Appeals of the State of New York, and afterwards such proceedings were had upon said appeal that, on or about the 29th day of April, 1890, the Court of Appeals reversed said judgment of conviction, and ordered a new trial (see Case, reported 121 N. Y., 250); upon such new trial afterwards had, the said McElvaine was again convicted, on or about the 25th day of September, 1890, of said crime of murder, and on or about the 1st day of October, 1890, he was sentenced to death (see Record, fol. 1); an appeal was again taken to the Court of Appeals (Warrant, fol. 7), and such proceedings were afterwards had upon said second appeal that said judgment of conviction was, by said Court of Appeals, duly affirmed, on or about the 24th day of February, 1891 (see Case, reported 125 N. Y., 596), and said court sent down

its remittitur to the said Court of Sessions to enforce said judgment, as rendered against the said McElvaine, according to law (Warrant, fol. 7), and thereafter said judgment of the Court of Appeals was duly made the judgment of said Court of Sessions; and thereafter, and on or about the 6th day of March, 1891, the said Charles McElvaine, in pursuance of sections 503 and 504 of the Code of Criminal Procedure of the State of New York, as amended by chapter 489 of the Laws of 1888, was duly brought before the said court by which he was convicted; and thereupon the said court did duly issue its warrant to the agent and warden of the State prison mentioned in the original warrant and sentence, which warrant was under the hand of the judge presiding at the said court, and which warrant duly commanded the said agent and warden of Sing Sing Prison to do execution of the sentence upon the said Charles McElvaine, during the week commencing on the 20th day of April, 1891. (See Warrant, fol. 7.)

On or about the 21st day of April, 1891, said Charles McElvaine, by A. C. Astarita, his attorney, presented to the United States circuit judges for the Southern District of New York, a petition dated April 21, 1891, praying that the said court forthwith issue a writ of *habeas corpus* to Augustus A. Brush, then agent and warden of Sing Sing prison, requiring him to produce the body of said Charles McElvaine before said court, at some time to be designated in said writ, there to abide what should be awarded by said court in the premises (see Record, fols. 1–8); afterwards such proceedings were had that on or about the said 21st day of April, 1891, at a stated term of the Circuit Court of the United States for the Southern District of New York, held in the city of New York, an order was made by which the prayer of said petition was in all things denied (see Record, folio 8); afterwards the said attorney for the said McElvaine did, on

or about the 21st day of April, 1891, appeal from said order to the Supreme Court of the United States, which appeal was in form allowed by the Hon. E. Henry Lacombe, circuit judge for the said district, and the clerk of said Circuit Court was directed to send to the Supreme Court of the United States a transcript of the said decision and order thereupon and the appeal (see Record, fol. 9); that thereafter, and on or about the 22d day of April, 1891, there was served upon the Attorney-General of the State of New York, the attorney for the appellee herein, a certified copy of citation to appear at the Supreme Court of the United States, at Washington, pursuant to said appeal, to show cause why the decision in the said appeal should not be corrected, etc. (See Record, fols. 10–13) The case has been advanced and set down for argument.

It was stipulated, October 26, 1891, that the appellant herein might print, as a part of the record herein, a certified copy of the warrant for the execution of McElvaine, dated March 6, 1891. (See fol. 1 of Warrant, as printed.)

The following, it is believed, are the only provisions of the Code of Criminal Procedure of the State of New York bearing upon any of the questions properly under consideration upon this appeal:

"Sec. 464. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument."

"Sec. 491. When a defendant is sentenced to the punishment of death the judge or judges holding the court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and

deliver to the sheriff of the county a warrant, stating the conviction and sentence, and appointing the week within which sentence must be executed. Said warrant must be directed to the agent and warden of the State prison of this State designated by law as the place of confinement for convicts sentenced to imprisonment in a State prison in the judicial district wherein such conviction has taken place, commanding such agent and warden to do execution of the sentence upon some day within the week thus appointed. Within ten days after the issuing of such warrant the said sheriff must deliver the defendant, together with the warrant, to the agent and warden of the State prison therein named From the time of said delivery to the said agent and warden until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the defendant shall be kept in solitary confinement at said State prison, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family."

"Sec. 492. The week so appointed must begin less than four weeks and not more than eight weeks after the sentence. The time of execution within the said week shall be left to the discretion of the agent and warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided."

"Sec. 503. Whenever, for any reason other than insanity or pregnancy, a defendant sentenced to the punishment of death has not been executed pursuant to the sentence, at the time specified thereby, and the sentence or judgment inflict-

ing the punishment stands in full force, the Court of Appeals or a judge thereof, or the Supreme Court or a justice thereof, upon application by the Attorney-General or of the district attorney of the county where the conviction was had, must make an order, directed to the agent and warden or other officer in whose custody said defendant may be, commanding him to bring the convict before the Court of Appeals or a General Term of the Supreme Court in the department, or a term of the Court of Oyer and Terminer in the county where the conviction was had. If the defendant be at large, a warrant may be issued by the Court of Appeals or a judge thereof, or by the Supreme Court or a justice thereof, directing any sheriff or other officer to bring the defendant before the Court of Appeals or the Supreme Court at a General Term thereof, or before a term of the Court of Oyer and Terminer in that county."

"Sec. 504. *Upon the defendant being brought before that court, it must inquire into the circumstances, and if no legal reason exists against the execution of the sentence, it must issue its warrant* to the agent and warden of the State prison mentioned in the original warrant and sentence, under the hands of the judge or judges, or a majority of them, of whom the judge presiding must be one, commanding the said agent and warden to do execution of the sentence during the week appointed therein. The warrant must be obeyed by the agent and warden accordingly. The time of the execution within said week shall be left to the discretion of the agent and warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided."

"Sec. 517. An appeal to the Supreme Court may be taken by the defendant from the judgment on a conviction after

indictment, except that when the judgment is of death, the appeal must be taken direct to the Court of Appeals, and, upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred and eighty-five, may be reviewed."

"Sec. 528 An appeal to the Court of Appeals, from a judgment of the Supreme Court, affirming a judgment of conviction, stays the execution of the judgment appealed from, upon filing, with the notice of appeal, a certificate of a judge of the Court of Appeals or of the Supreme Court, that in his opinion there is reasonable doubt whether the judgment should stand, but not otherwise. *When the judgment is of death* an appeal to the Court of Appeals stays the execution, of course, until the determination of the appeal. When the judgment is of death the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence *or against law*, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below."

POINTS.

I.

From the petition presented to Judge Lacombe upon the application for the writ of *habeas corpus*, it appears that the following grounds were relied upon by the petitioner for the granting of said writ.

First. "That the second sentence passed upon your petitioner was in violation of the Constitution and laws of the State of New York and of the United States, the court having no right or authority according to law to sentence your petitioner the second time as deponent believes." (Fols. 1 and 2.)

Second. "Your petitioner further shows that under and by virtue of the first sentence herein he entered upon and expiated in part the punishment affixed by existing law to his offense." (Fol. 2.)

Third. That by virtue of the sentence passed on or about the sixth day of March, 1891, he was remanded to the custody of A. A. Brush, the agent and warden at the State prison at Sing Sing, State of New York, "to be executed accordingly, and that said Augustus A. Brush now holds petitioner and restrains him of his liberty for the purpose of killing your petitioner in violation of the Constitution and laws of the United States and not otherwise." (Fol. 2.)

Fourth. The petitioner further claims that the law under which sentence was passed is unconstitutional and void and in antagonism to the laws and Constitution of the United States, particularly in the following respects and features: "That section 491 of the Code of Criminal Procedure of the State of New York, being a section, part and provision of the law under which the petitioner has been sentenced to death, provides, among other things, as follows: 'From the time of said delivery to the said agent and warden until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, he shall be kept in solitary confinement at said State prison, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family." (Fols. 2 and 3.)

Fifth. It is also claimed that that portion of the sentence "which prescribes as an element in and part of the punishment of the accused solitary confinement previous to his execution is in violation of the Constitution of the United

States and the adjudication of the United States Supreme Court heretofore had in that regard, the same, however, being in the nature of *dicta*." (Fol. 3.)

Sixth. It is further claimed that the Code of Criminal Procedure of the State of New York, from sections 491 to 509, inclusive "is unconstitutional and void, because under and by virtue of its provisions no authority is vested in any individual or public official to put the accused person to death." (Fol. 3.)

Seventh. It is further alleged that the law aforesaid is unconstitutional and void "because it does not prescribe how the accused shall be put to death; but it is left entirely to the discretion of the warden of the prison to determine in what manner the accused shall be put to death." (Fol. 4.)

Eighth. It is further alleged "that it was the duty of the court who inflicted the sentence to explicitly direct the warden to inflict the death penalty at a certain time instead of leaving it discretionary with that official to fix the day and hour of the exection." (Fol. 4.)

Ninth. It is further claimed "that the warrant herein which commands the execution of your petitioner does not command that the accused be subjected to solitary confinement." (Fol. 4.)

Tenth. The petitioner alleges that there are other grounds which he believes will show the law in question to be unconstitutional and void, which will be presented to the court on the argument upon said petition; and the petitioner does allege certain general objections to the said judgment and sentence. (Fols. 5 and 6.) But, as alleged by the petitioner, the contention is broadly this: "*That the Supreme Court of the United States has the right to review and reverse any*

judgment based upon the operation of an unconstitutional law or founded upon the unconstitutional application of a constitutional measure." (Fol. 6.)

It may be here said, in connection with the objections of the appellant, that the warrant of March 6, 1891, for the execution of McElvaine, and which is printed as part of the record, contains a recital of the trial, conviction, and sentence of the said McElvaine, and the circumstances attending the commission of the crime. (See fols. 1 to 7 of Warrant.) Also of an appeal from the judgment of conviction and sentence to the Court of Appeals, which conviction and sentence so appealed from was had on the 1st day of October, 1890. (Fol. 6.)

It also appears from said recitals that the Court of Appeals rendered a decision and judgment whereby it affirmed in all things the said judgment of conviction and sentence on the 24th day of February, 1891, and that the remittitur of said court was afterwards filed with the court below, and that it appeared by said remittitur that the Court of Appeals had ordered that the said judgment be remitted to the Court of Sessions to enforce its judgment as rendered against the said Charles McElvaine according to law; and that the said Court of Sessions did order and adjudge that the judgment of conviction and sentence thereon rendered on the 1st day of October, 1890, against the said Charles McElvaine be enforced and executed in manner provided by law, and did by said order or judgment "designate and appoint the week beginning with Monday, the 20th day of April, one thousand eight hundred and ninety-one, as the time within which the said judgment of death, as pronounced by said Court of Sessions against the said Charles McElvaine should be executed and enforced." (Fol. 7.)

And said warrant contains the further recital: "Now, therefore, we do by this warrant, pursuant to the statute in such

case made and provided, require, direct and command that you, the agent and warden of the State Prison at Sing Sing, cause the said judgment and sentence to be executed and enforced, and that within the week beginning on Monday, the 20th day of April, 1891, you do execution of said judgment and sentence by putting him, the said Charles McElvaine, *to death in the mode, manner, and way and at the place by law prescribed and provided.*" (Fol. 8.)

As a matter of fact, an appeal was taken to the Court of Appeals from a judgment of conviction of McElvaine, rendered October 23, 1889, and the Court of Appeals upon that appeal, at the April Term, 1890, reversed the judgment of conviction for the admission of improper evidence. (See 121 N. Y., 250.) Upon the second appeal referred to, the decision of the Court of Appeals is reported in 125 New York, 596.

II.

The Supreme Court of the United States in re Kemmler (136 U. S., 436 and 447), was called upon to consider and to determine as to the constitutionality of the statute of the State of New York in question here. This case was an application for a writ of error to the Court of Appeals of the State of New York heard in the first instance by this court. Among other things, Mr. Chief Justice Fuller, delivering the opinion of the court, said: "The decision of the State Courts sustaining the validity of the act under the State Constitution is not re-examinable here, nor was that decision against any title, right, privilege or immunity, specially set up or claimed by the petitioner under the Constitution of the United States. Treating it as involving an adjudication that the statute was not repugnant to the Federal Constitution, that conclusion was so plainly right that we should not be justified in allow-

ing the writ upon the ground that error might have supervened therein." (See page 447.)

It was further held that this statute was not in violation of the fifth or the fourteenth amendment to the Federal Constitution, and the learned chief justice further said :

"The enactment of this statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence ; and the Legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law."

And this case is also authority for the doctrine enunciated in Barbier v. Connolly (113 U. S., 31) that the fourteenth amendment to the Constitution "was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order."

And so referring to the fifth ground of objection stated in the petition herein (in the enumeration contained in this brief), that the Supreme Court had heretofore decided that so much of the statute as provided for solitary confinement previous to execution was in violation of the Constitution of the United States "*in the nature of dicta*," we think it must be a mistake. This court in the case of Medley (134 U. S., 160), did hold that a statute passed after the commission of the crime of murder, which adds to the punishment of death (that being the punishment when the murder was committed) the further punishment of imprisonment in solitary confinement until the execution, when attempted to be enforced

against the person convicted of that murder, is an *ex post facto* law, and a sentence inflicting both punishments upon him is void. But, of course, there was no intimation that such a statute as applied to the punishment of a crime committed after the passage of a statute was in violation of the Federal Constitution. But, on the contrary, this court, in Holden v. Minnesota (137 U. S., 483), clearly held that such a statute was not in violation of the Constitution.

And so referring to the sixth, seventh and eighth grounds of objection as enumerated in this brief, while it is not entirely clear what was the exact point intended to be raised by the petitioner, we have assumed that it probably was: First. The warrant should have stated the manner in which the death penalty was to be executed. Second. The exact day for execution should have been fixed by the court. It will be seen, however, that under the statute and the sentence of the court, the agent and warden was authorized and directed "to do execution of the sentence upon some day within the week," which week, by section 491 of chapter 489 of the Laws of 1888, must be fixed by the court and stated in the warrant delivered to the sheriff; but which warrant is to be directed to the agent and warden of the State prison, and which week, by section 492 of said act, must begin not less than four weeks and not more than eight weeks after the sentence, and by the same section it is provided that "the time of the execution within said week shall be left to the discretion of the agent and warden, to whom the warrant is directed."

If we are right in the assumption as to the real grounds of objection, it is sufficient to say that the second question was involved in and determined by this court in Holden v. Minnesota (*supra*), except in that case the statute devolved upon the Governor the discretion of fixing the time of execution,

"and depended upon the warrant of the Governor." This court said, at page 495, "it is competent for the State to establish such regulations, and they are entirely consistent with due process of law. The court sentenced the convict to the punishment prescribed for the crime of murder in the first degree, leaving the precise day for inflicting the punishment to be determined by the Governor. The order designating the day of execution is, strictly speaking, no part of the judgment unless made so by statute. And the power conferred upon the Governor to fix the time of infliction is no more arbitrary in its nature than the same power would be if conferred upon the court. Whether conferred upon the Governor or the court it is arbitrary in no other sense than every power is arbitrary that depends upon the discretion of the tribunal or the person authorized to exercise it. It may also be observed that at common law the sentence of death was generally silent as to the precise day of execution. * * * Of course, if the statute so requires, the court must in its sentence fix the day of execution. Equally must it forbear to do that if the statute confers upon some executive officer the power to designate the time of infliction." And, as to the first question, it may be said that the Court of Appeals, in the case of Trezza, hereafter referred to, has decided the point adversely to the contention of the petitioner.

If, however, the objection intended to be raised is that the warrant did not command the agent and warden by express language to keep the defendant "in solitary confinement at said State prison," as provided by section 491 (*supra*), as indicated in the ninth ground of objection, it would seem to be sufficient to say: First. That this is a question which the appellant is in no position to urge, inasmuch as he claims that part of the law has been decided by the "*dicta*" of this court to be unconstitutional. And if this is so, the court was

amply justified in refusing to insert that part of the requirement of the statute in the warrant. (See Holden v. Minnesota, *supra*, p. 493.) Second. If this part of the law was unconstitutional, it could in no way affect the provision as to the execution of the death penalty. One part of a statute, if separable, may be clearly unconstitutional and the remainder of it be held to be perfectly valid. (See Presser v. Illinois, 116 U. S., 263.) In such a case the appellant's grievance, if he have any, is with the agent and warden. Clearly he would not be entitled to be released and thereby prevent any part of the execution of the sentence. But it is the appellant's contention that that part of the law which prescribes solitary confinement is unconstitutional, and he objects that the warrant is silent as to any command upon the agent and warden to do execution of that part of the law. But he nowhere alleges in his petition that he is kept in solitary confinement. So that in no view of the case, if the appellant is right, was there any ground, so far as this part of the statute is concerned, for the granting of the writ of *habeas corpus* asked for. Third. But it is claimed, in behalf of the State, that the whole of this law is constitutional and that the command contained in the warrant to the agent and warden: "Now, therefore, we do by this warrant, pursuant to the statute in such case made and provided, require, direct and command that you, the agent and warden of the State prison at Sing Sing, cause the said judgment and sentence to be executed and enforced * * * in the mode, manner and way and at the place by law prescribed and provided," is by way of recital a sufficient direction, and is ample authority to him and justification for any confinement which may be prescribed of the appellant under the statute in question here.

And with reference to the allegation in the petition (at fol. 4), that neither by motion for a new trial nor by motion in

arrest of judgment, nor otherwise, under the laws of the State of New York, can any court of said State take cognizance of or afford the petitioner any relief in the premises, it is sufficient to say that evidently the petitioner is mistaken. (See In re Wood, 140 U. S., 278.)

And so with reference to the allegation in the petition (fol. 5), as to the refusal of the court to permit the accused to enter, through his counsel, the plea of insanity; it is sufficient to say that it does not appear that there was any such refusal. But the whole question was discussed by the Court of Appeals in this case, reported in 125 New York (*supra*); and, as was said by this court (In re Wood, *supra*, page 286): "But we may, as doubtless the Circuit Court did, take judicial notice of these facts," referring to the facts established in the decision of the Court of Appeals in the Wood case.

And so with reference to the intimation of the counsel for the prisoner, in the brief filed by him in answer to the application to advance this case, that one of the grounds intended to be argued is "*that the law under which the petitioner was sentenced to death is that it abridges and restrains the liberty of the press*;" it is sufficient to say that this court, in Holden v. Minnesota (*supra*, page 491), with reference to section 5 of the statute then under consideration, fixing the number and character of the witnesses to the execution, and the exclusion altogether of reporters or representatives of newspapers, said: "*These are regulations which the Legislature, in its wisdom and for the public good, could legally prescribe in respect to executions occurring after the passage of the act, and cannot, even when applied to offenses previously committed, be regarded as ex post facto within the meaning of the Constitution.*"

III.

The only remaining grounds of error sought to be raised by the appellant by the writ of *habeas corpus*, which are important or necessary to be considered, are included in the first, second and third grounds of objection (enumerated in this brief). The only ground of objection which can be spelled out from the allegations of the petition is the inference that the petitioner having been convicted of the crime of murder took an appeal from such conviction and sentence to the Court of Appeals, and which judgment was affirmed by that court, and thereupon the petitioner was again brought before the Court of Sessions where he had been convicted, and that court, on the 6th day of March, 1891, issued a new warrant, as authorized by statute, commanding the agent and warden to execute the sentence of death in the week commencing April 20, 1891. It may also be assumed, for the purposes of the argument, that the petitioner intended to be understood as alleging that intermediate the taking of his appeal and the affirmance of the judgment and the issuing of the new warrant, he had been in solitary confinement under and in pursuance of the first sentence and the first warrant, although no such allegation is made in the petition. But assuming that the question has been sufficiently raised, it is necessary to refer to the different sections of the Code of Criminal Procedure under which the different proceedings referred to were taken. The appeal taken by the appellant was, by virtue of section 517, directly from the judgment of conviction to the Court of Appeals, and by section 520 this appeal was a matter of right; and by section 528, "when the judgment is of death an appeal to the Court of Appeals stays the execution, of course, until the determination of the appeal." And by the same section provision is made that in

such a case the Court of Appeals might order a new trial if the verdict was against the weight of evidence or against law, or if justice required a new trial. And by section 464 the granting of a new trial places the parties in the same position as if no trial had been had. It is clear, therefore, that if any new trial has been had, after conviction, or if any part of the sentence was unexecuted, it was brought about by the voluntary action of the appellant himself, and we think it is clear that he cannot now be heard to say that the court was powerless to enforce the final judgment resulting from a new trial or from the affirmance of the judgment appealed from by the Court of Appeals.

IV.

The provision of the Federal Constitution relied upon by the appellant contained in the fifth article of amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," has no application to the statute of a State and was not designed as a limit upon the State government in reference to the citizens of that State. This has been frequently held. (See Twitchell v. Commonwealth, 7 Wallace, 321; Spies v. Illinois, 123 U. S., 143.) And neither does the fourteenth amendment afford the appellant any relief in that respect. (See In re Kemmler, 136 U. S., *supra*.)

V.

The only way the question could be raised was by plea in the State court, and if this court should improperly refuse to give the prisoner the benefit of the plea after being properly established by evidence, the appellant's redress would be by writ of error to the highest court of the State. "*While the courts of the United States have power upon*

habeas corpus to inquire into the cause of the detention of anyone claiming to be restrained of his liberty in violation of the Constitution or laws or treaties of the United States, it was not intended by Congress that they should by writs of habeas corpus obstruct the ordinary administration of the criminal laws of the State through their own tribunals." (In re Wood, 140 U. S., 289.)

But it never has been claimed that this provision of the Constitution as to being twice put in jeopardy of life had any application where a verdict was set aside upon an appeal prosecuted by the prisoner. (See Ex parte Lange, 18 U. S., 173 and 201, and cases cited.)

VI.

The right of appeal did not belong to the prisoner at common law, and until the Third of Queen Anne a writ of error or appeal in any criminal case was held to be merely *ex gratia*. The Legislature of this State having given the right of appeal to a convicted person, and having also enacted what the consequences or results of such appeal should be, it does not lie in the mouth of the prisoner to assert, after having a new trial granted, that he can not again be tried, and if found guilty punished. This doctrine is well settled in this State and others. (See People v. Palmer, 109 N. Y., 413.) Neither is there any question that the Legislature of a State had the power to pass such an act. (Kring v. Missouri, 107 U. S., 221.)

VII.

With reference to any argument that may be offered here by the appellant's attorney, that he has been, by virtue of any sentence of the Court of Sessions or the execution of its warrant, twice put in jeopardy of life by reason of his solitary

confinement under said warrant during the time his appeal was being considered in the Court of Appeals, it is proper to say that this question was considered and decided by the Court of Appeals of New York, at the last October Term of said court, in the case of The People ex rel. Nicola Trezza, Appellant, v. A. A. Brush, Agent and Warden, Respondent. This case has not yet been reported, and inasmuch as Trezza has also taken an appeal from the denial of a writ of *habeas corpus* to this court, and which case, by the order of this court, has been set down for argument at the same time as the McElvaine case, it has been thought best to print a copy of the opinion rendered by the court in the Trezza case, and which is hereto annexed, marked Appendix "A." It will be seen by an examination of the opinion in that case that the Court of Appeals discussed and determined two questions raised by Trezza, viz.: First. That the sentence did not specify the mode in which the death should be inflicted, viz., that provided by the statute of 1888, "by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict be dead." Second. The claim made by Trezza that he had been once punished. The Court of Appeals determined both propositions against Trezza, Andrews J., writing the opinion. The court, in this case, was necessarily called upon to give construction to section 528 of the Code of Criminal Procedure as to whether an appeal in a capital case effected a stay of "*the judgment of death only*," and the court held that that was the only effect. The only difference in this case and that of McElvaine is in the fact that Trezza only had one trial and one appeal.

It is not necessary that anything be added to the opinion referred to to sustain the propositions therein determined.

The Supreme Court will follow the adjudications of the highest court of the State in the construction of its own statutes. This is a general rule of decision, and this case does not come within any of the exceptions to the rule. (Fairfield v. Co. of Gallatin, 100 U. S., 52.)

VIII.

For all of the foregoing reasons the order or judgment of Mr. Justice Lacombe, denying the application for the writ of *habeas corpus*, should be affirmed.

CHARLES F. TABOR, *Att'y-Gen'l*,
Attorney for the Agent and Warden of Sing Sing Prison and for the State of New York, Appellees herein.

Office and post-office address, Capitol, Albany, N. Y.

APPENDIX A.

COURT OF APPEALS — October 20, 1891.

THE PEOPLE, RESPONDENT,

against

NICOLA TREZZA, APPELLANT.

THE PEOPLE EX REL. NICOLA TREZZA, APPELLANT,

against

A. A. BRUSH, AGENT AND WARDEN, ETC., RESPONDENT.

A. H. Dailey, for appellant.

John F. Clarke, assistant district attorney, for respondent.

ANDREWS, J. The appeal in the case first entitled is from an order of the General Term of the Second Department, affirming an order made by Justice Calvin E. Pratt, denying an application of Trezza for a stay of proceedings, pending an appeal by him to the General Term of the Supreme Court, from an order of the Court of Sessions of Kings county, denying his motion for a new trial, on the ground of newly discovered evidence. Trezza was tried, convicted and sentenced at the Court of Sessions of Kings county, for the crime of murder in the first degree. He appealed from the judgment to the Court of Appeals, under the statute, chapter 493 of the Laws of 1887, where the judgment was affirmed. The motion for a new trial was made after judgment for affirmance had been rendered. The motion to stay proceedings was denied, on the ground that there is no statute authorizing an appeal from an order denying a motion for a new trial, under the circumstances of this case. The refusal of

the stay was plainly correct, if no right to appeal from the order refusing a new trial in such case existed.

The right of appeal in criminal cases is statutory only, and in the absence of a statute authorizing an appeal in a given case, no appeal can be taken. The court in which the trial of an indictment is had has power to entertain a motion for a new trial on the ground of newly discovered evidence (Code of Crim. Pro., secs. 463, 465), and may grant or refuse it. The Code of Criminal Procedure, title 11, defines and regulates the right of appeal in criminal cases. Section 517, as originally enacted, was as follows:

"Sec. 517. An appeal to the Supreme Court may be taken by the defendant from the judgment on a conviction after indictment, and upon any appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment roll, as prescribed in section 485, may be reviewed."

By section 485, a copy of the minutes of any proceedings upon a motion for a new trial is required to be annexed to and forms a part of, the judgment roll. Section 517 was amended by chapter 493 of the Laws of 1887, by providing that when the judgment is of death, the appeal must be taken direct to the Court of Appeals, and that court was authorized to review any intermediate order or proceeding forming part of the judgment roll, as the Supreme Court was authorized to do by the original section.

It will be observed that the section only authorizes a review of intermediate orders and proceedings in connection with an appeal from the judgment, and when they are embodied in the judgment roll. There is no statute provision authorizing an appeal from an order denying a new trial, except as incident to an appeal from the judgment.

It is said that the Legislature could not have intended to permit an appeal from such an order in that case, and to deny it where the application for a new trial is made after final judgment of affirmance, and denied, when it would be too late to make the proceedings a part of the judgment roll. The Legislature seemed to assume that such proceedings would in all cases be taken before an appeal from a judgment. It may be that the failure to provide for an appeal in such a case as this was *casus omissis*. But the courts must be guided by the law as it is, and cannot give an appeal where none is given by the statute, and there is no statute authorizing an appeal from an order denying a new trial made after the roll is made up and the final affirmance of the judgment.

The contention that the Legislature in abolishing writ of error and *certiorari*, as was done by section 517, did not intend to take away any remedies formerly obtainable in those proceedings, has no force, for the reason that neither a writ of error nor *certiorari* would bring up for review an order denying a motion for a new trial made on the ground that the verdict was against the weight of evidence, or on the ground of newly discovered evidence. (People v. Shorter, 2 N. Y., 193; Manke v. People, 74 id., 415; People v. Casey, 72 N. Y., 393; Hunt v. People, 76 N. Y., 89; People ex rel. Folk v. Board of Police, etc., 69 id., 408; People ex rel. S. & U. H. R. R. Co. v. Betts, 55 id., 600.)

There was no error in the order of the General Term affirming the order of Justice Pratt, refusing a stay of proceedings, and it should, therefore, be affirmed.

The appeal in the second case above entitled is from an order of the General Term, affirming an order of Mr. Justice Cullen dismissing a writ of *habeas corpus* granted upon the application of Trezza for his discharge from imprisonment in

the State Prison at Sing Sing, and remanding him to the custody of the agent and warden.

When the writ was granted Trezza was held by the agent and warden under a warrant issued by the Court of Sessions of Kings county, dated March 6, 1891, reciting his conviction on an indictment charging him with the crime of murder of one Alexander Salvano, in that county on the 6th day of April, 1890; his trial, conviction and sentence to the punishment of death, and that he be delivered by the sheriff within ten days from the date of his sentence to the said agent and warden of the State Prison at Sing Sing, and that said agent and warden within the week beginning Monday, the 21st of July, 1890, execute him, the said Trezza, "by putting him to death in the mode, manner and way, and at the place by law prescribed and provided;" that Trezza on the 11th of June, 1890, appealed from the judgment of the Court of Appeals, which court affirmed the judgment February 24th, 1891; that Trezza was re-sentenced by the Court of Sessions of Kings county to be executed during the month beginning Monday, the 20th day of April, 1891. The warrant then proceeds to command the agent and warden, to whom it was addressed, to cause the said judgment and sentence to be executed within the week last mentioned, "by putting him, the said Nicola Trezza, to death in the mode, manner and way, and at the place by law prescribed and provided."

It appears that after the appeal taken by Trezza he was taken to Sing Sing Prison, and there detained in close confinement, where he remained until he was taken to Kings county for resentence, and was then remanded again to the custody of the agent and warden of the State prison.

There are two grounds urged for the discharge of Trezza: First. That the sentence did not specify the mode in which the death should be inflicted, viz., that provided by the statute of

1888, "by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict be dead." We think there is no ground for this contention. The agent and warden was commanded to put the convict to death in the mode provided and prescribed by law. The recital in the warrant showed that the convict was convicted for murder committed after the statute of 1888 was passed, and, therefore, was subject to that statute. The sentence was death. This was not left to inference, and the warrant commanded the punishment to be inflicted. The agent and warden was required to inflict it in the mode provided by law, and this law he must be presumed to have known. The court, presumably, could not prescribe, by any measurement, the intensity of the current of electricity required to produce death, or specify the exact time the current should be continued. These things must, of necessity, be left to the judgment of the agent or warden. We think the warrant was sufficiently definite and specific. It has undoubtedly been the practice, when death by hanging was the mode of punishment prescribed in cases of convictions for capital offenses, to specify this in the sentence and judgment. This practice was derived from the common law, which prescribed different modes of death in different cases and was adopted to distinguish this mode of execution from that in cases of conviction for high treason and other atrocious crimes where the judgment directed that the condemned person should be drawn to the place of execution, emboweled alive, and then beheaded and quartered. (2 Black. Com., 376; 2 Hale's P. C., 412.) But here, where but one mode of execution exists, no greater particularity than that employed in the judgment in question seems to be necessary. (See People v. Bork, 96 N. Y., 188; People ex rel. Van Houton v. Sadler,

97 id., 146; Weed v. People, 31 id., 465.) The objection is, we think, untenable.

The *second* ground upon which the discharge of Trezza is claimed is that he has been once punished. The argument is that the appeal to the Court of Appeals after the first sentence stayed both the execution of the direction that Trezza should be kept in solitary confinement until the execution of the death penalty, as well as the part of the sentence that he be put to death, but that as his solitary confinement in the State prison was continued pending the appeal, and that, as was held in the case of In re Medley (134 U. S., 160) the sentence to solitary confinement accompanying the death sentence is a part of the punishment, he has suffered that part once and could not lawfully be re-sentenced to close confinement, to be followed by death. If the counsel is right in respect to the operation of the appeal, as staying both a continuance of the close confinement and the execution of the death penalty, then it simply follows that Trezza was unlawfully imprisoned, and the usual remedy for the illegal restraint was open to him. This restraint was, in this view, not the act of the law, but the illegal act of the agent or warden. The convict could not elect to submit to it, and then treat it as a satisfaction of the sentence. But we agree with the learned judge before whom the proceeding was taken, that by the true construction of section 528 of the Code of Criminal Procedure, as amended in 1887, an appeal to this court from a conviction in a capital case stays the judgment of death only, and not that part of the judgment providing for the custody of the defendant, between his removal to the State prison and his execution.

This would seem to be all that a convicted criminal could, of right, demand, and an opposite construction would occasion much inconvenience. Whether an appeal in a crimi-

nal case stays the execution of the sentence depends upon the statute. It not infrequently happens that the execution of a sentence to imprisonment continues, notwithstanding an appeal. The convict, if he obtains a reversal of the judgment and is again convicted on a second trial, may be sentenced to a new term of imprisonment, and the court is not bound to regulate the second sentence in view of the fact that the convicted has already suffered imprisonment under the first sentence. The re-sentence in the present case was rendered necessary by reason of the fact that Trezza, by his own act in his own interest, had, by his appeal, prevented the execution of the death penalty at the time fixed by the first sentence.

The construction of section 528 is not entirely clear, but the construction we have given is justified by the language, and it probably accords with the intention of the Legislature.

We think the order in this case should be affirmed.

"All concur."

(A copy.)

H. E. SICKELS,
Reporter, per C.